

STATE OF MICHIGAN
COURT OF APPEALS

LARRY KULHAVI, et al.,

Plaintiffs-Appellants and Cross-
Appellees,

v

CITY OF HAMTRAMCK, a Michigan Municipal
Corporation, and BOARD OF TRUSTEES OF THE
HAMTRAMCK POLICE AND FIRE PENSION
FUND,

Defendants-Appellees and Cross-
Appellants.

UNPUBLISHED
July 7, 2000

No. 209924
Wayne Circuit Court
LC No. 92-227143-CK

ELMER BIRKEL, et al.,

Plaintiffs-Appellants and Cross-
Appellees,

v

CITY OF HAMTRAMCK, a Michigan Municipal
Corporation, and BOARD OF TRUSTEES OF THE
HAMTRAMCK POLICE AND FIRE PENSION
SYSTEM,

Defendants-Appellees and Cross-
Appellants.

No. 209930
Wayne Circuit Court
LC No. 93-312422-CK

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

This case is here following remand to the trial court.¹ Plaintiffs² appeal and defendants cross-appeal by right from the trial court's opinion and order determining that the basis on which plaintiffs' pensions are calculated includes gun allowances, food allowances, and shift differential, and does not include clothing allowances, overtime, sick leave incentive pay for firefighters, and prep time paid to ranking police officers. We affirm in part and reverse in part.

I.

Active police and firefighters [generally referred to here as "active employees"] of the City of Hamtramck receive cash payments from the City in the form of a base salary, longevity, holiday pay, overtime, shift differential, a sick leave incentive program, prep time, and allowances for guns, food and clothing. In addition to the cash benefits, active employees have life, health and dental insurance paid on their behalf and receive additional time off. Before the instant lawsuit, defendants included the cash payments of base salary, longevity and holiday pay of active employees in computing plaintiffs' pensions. In the instant lawsuit, plaintiffs contend that, in addition to base salary, longevity and holiday pay, the basis for their pension calculations should include the payments for prep time paid to ranking police officers, sick leave incentive pay for firefighters, overtime, shift differential, and allowances for guns, clothing and food. Defendants argue that none of these items should be included.

II.

The amount of plaintiffs' pensions is governed by language in the Hamtramck City Charter, Chapter XIII, Section 4, which states:

Every person subject to retirement as above set forth shall be retired on a pension at the rate of one-half (1/2) of the pay of the rank in which he was serving at the time of retirement, or his disability was caused, and in the event of any change at any time thereafter in said rate of pay, then at the rate of one-half (1/2) the pay for said rank so changed.

Interpretation of the city charter is subject to this Court's de novo review. *Oakland Co Bd of Rd Comm'rs v Michigan Property Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998); *Detroit v Walker*, 445 Mich 682, 691; 520 NW2d 135 (1994). In its opinion before remand, another panel of this Court identified the key language in the charter provision to be construed as "pay" or "rate of pay." The central issue thus presented to the trial court on remand was what does "pay" or "rate of pay" mean, i.e., what cash benefits are included in the basis on which plaintiffs' pensions are

¹ *Kulhavi v Hamtramck*, unpublished opinion per curiam, issued May 24, 1996 (Docket Nos. 172005 and 172006).

² Plaintiffs are members of a class comprised of retired policemen and firemen of the City of Hamtramck and their beneficiaries. The claims of plaintiffs pertain to the police and fire pension system in effect for employees hired before 1971.

calculated? However, on remand, the trial court did not construe the word “pay” or the phrase “rate of pay” and instead construed the phrase “*base rate of pay*.” This language is not found in the subject charter provision.

This Court, in *Gentile v Detroit*, 139 Mich App 608, 614; 362 NW2d 848 (1984), set forth the standard for construing the language of charter provisions as follows:

“The primary rule is the rule of ‘common understanding’ described by Justice Cooley:

“‘ . . . *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.*’” [Quoting *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). (Emphasis in original.)]

Utilizing the “rule of common understanding,” the Court in *Gentile* construed the phrase “rate of one-half the pay” found in a Detroit charter provision that is similar to the instant charter provision. The Court formulated the question before it as “[w]hat would reasonable minds, the great mass of the people, believe was meant by ‘pay’ . . . when considering pension rights?” *Gentile, supra* at 614-615. The Court concluded that it meant “normal payments made regularly in the course of the plaintiffs’ work for regular work done.” *Id.* at 618.

We believe that the great mass of people would conclude that the phrase “base rate of pay” is narrower in scope than “rate of pay” and is more akin to “base salary” or “base pay” than the more encompassing terms “pay” or “rate of pay.” In the prior opinion in this case remanding to the trial court, this Court expressly determined that *Gentile* is on point and that “rate of pay” is not equated with base pay, despite defendants’ urgings to the contrary.³ Moreover, in *Banish v Hamtramck*, 9 Mich App 381, 388-389; 157 NW2d 445 (1968), Judge [now retired Justice] Levin, writing for this Court, construed the same charter provision that is at issue here and rejected the defendant City of Hamtramck’s contention that “pay,” as used in the provision, means *regular* salary and not any *other* pay.⁴

³ In their cross-appeal, defendants once again urge this Court not to rely on *Gentile, supra*. However, the panel that remanded this case rejected defendants’ arguments in this regard. Defendants neither moved for a rehearing of this Court’s prior decision in this case nor appealed the decision to the Supreme Court. We affirm this Court’s previous determination that *Gentile* is controlling in this case. See *Kalamazoo v Dep’t of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

⁴ Judge Levin determined that “a fair reading of the charter language requires that the term ‘pay’ . . . be interpreted to mean the regular compensation currently paid to those of the rank held by the retiree at the time of his retirement.” *Banish, supra* at 389. This Court in *Banish* determined that “pay” in the

(continued...)

We hold that to the extent that on remand the trial court modified the appropriate terms to be construed, the trial court clearly erred.

III.

In reversing the trial court's grant of summary disposition to defendants, the previous panel in this case set forth the applicable law and issued specific instructions to the trial court on how the court was to determine whether each of the items at issue should be included in the "pay" or "rate of pay" on which plaintiffs' pensions are calculated. The panel instructed the trial court that it was to apply the operable definition of "pay" set forth in *Gentile* to the facts in this case as follows:

To the extent that longevity pay, holiday pay, vacation pay, leave time, overtime (whether mandatory or voluntary), shift differential, cost of living allowance and personal leave time "are normal payments made regularly in the course of plaintiffs' work for regular work done" under the facts of this case, they should be included in defendant's calculations.

Citing *Hay v Highland Park*, 134 Mich App 624, 636; 351 NW2d 622 (1984), this Court expressly determined that "[e]ach of these benefits enhances the 'regular periodic salaries paid to employees based on their individual circumstances.'"⁵

We now examine the various contested items to determine if the trial court erred in including or excluding the items from the pension calculations.

Overtime Pay

As noted above, in this Court's remand to the trial court, the Court directed the trial court that overtime should be included in pension calculations to the extent overtime, whether mandatory or voluntary, constitutes normal payments made regularly in the course of plaintiffs' work for regular work done under the facts of this case. On remand, the trial court concluded that "[b]ecause of its voluntary, irregular nature, overtime pay cannot be considered as part of an employee's 'base rate of pay' for purposes of calculating the pension." We disagree and hold that the trial court clearly erred in excluding overtime pay from the pension calculations.

(...continued)

charter provision at issue included in-service pay, hazard pay, longevity pay and holiday pay. *Id.* at 389-392.

⁵ Relying on *Banish, supra* at 392, the panel expressly rejected defendants' argument that the items claimed by plaintiffs should not be included in pension calculations because five percent pension contributions were not deducted from these items. The panel also was not persuaded that defendants' long standing exclusions from pension calculations required this Court to conclude that fringe benefits should not be included in "rate of pay" in calculating plaintiffs' pensions. To the extent that defendants renew these arguments after remand, we again reject them. *Kalamazoo*, n 3 *supra*.

We disagree with the trial court's apparent conclusion that overtime is a bonus benefit for an unusual situation. This Court in *Gentile, supra* at 618, determined that overtime payments constitute "normal payments made regularly for regular work done." In the instant case, overtime payments were made for hours actually worked and were not a "bonus" or "gratuity." See *Banish, supra* at 390. Contrary to the findings of the trial court, overtime payments included without distinction both mandatory and voluntary overtime employees worked. The trial court ignored the fact that a significant portion of overtime is mandatory overtime, and the trial court seemed to discount the nature of the voluntary overtime. This Court had instructed the trial court that all overtime—whether mandatory or voluntary—was to be considered. Furthermore, the main purpose of the voluntary program was to adequately staff the City's traffic program. The fact that the traffic program generates revenue is incidental and relates to some of the City's *motivation* for maintaining this program, but it does not alter the nature of the activity involved. The nature of the activity—writing traffic tickets—is a basic police function and constitutes regular police work.

Defendants argue that the irregular distribution of overtime supports the trial court's conclusion that the overtime has an "irregular nature." However, the fact that the amount of overtime varies among the employees fits within the framework this Court previously set that overtime payment "enhances the 'regular periodic salaries paid to employees *based on their individual circumstances*.'" Parity among the employees for overtime is not necessary. This Court acknowledged that overtime and other cash benefits would vary on an individual basis. Moreover, to the extent that the City withheld five percent pension contributions from payments for accumulated time off based on overtime, equity dictates that there should be a corresponding inclusion of the overtime in the computation of plaintiffs' pension benefits.⁶

Under the facts of this case, the trial court clearly erred in excluding overtime from plaintiffs' pension calculations.

Shift Differential

As for overtime, this Court instructed the trial court to include shift differential in plaintiffs' pension calculations to the extent that such payments are "normal payments made regularly in the course of plaintiffs' work for regular work done."

The trial court concluded on remand that shift differential should be included in calculating "base rate of pay." The court reasoned as follows:

This payment was made to employees based on their working a specific shift. There is no indication that this amount was meant to reimburse the employees for any out of

⁶ Although in-service and hazard risk pay were the benefits at issue, this Court in *Banish, supra* at 392, stated that "[i]t would have been most ingenuous to have deducted the 5% from in service and hazard risk pay on the ground that they were 'pay,' and then to have claimed that such payments were not 'pay' for the purpose of computing retirement allowances."

pocket expense. Rather it was paid as an incident to an employee's having worked a specific shift, and hence should have been viewed as part of an employee's regular compensation for regular work done as long as the employee was assigned to a designated shift for which the shift differential was paid. Supportive of this conclusion is evidence that the City itself took a deduction attributable to the employee's contribution to the retirement fund from earnings attributable to the shift differential.

Defendants do not seriously argue that shift differential is not normal remuneration for normal work. Instead they primarily argue that calculating the impact of a shift differential on the individual pension benefits received by plaintiffs in the class they represent is a difficult, if not impossible, task because some of the personnel in the police department work days and do not receive a shift differential. Defendants' argument is unpersuasive. An accounting department should be capable of making the requisite mathematical computations.

We agree with the trial court: shift differential is part and parcel of the "pay" active employees receive for their regular work and should be included in plaintiffs' pension calculations. See *Gentile*, *supra* at 618, and *Hay*, *supra* at 636.

Prep Time for Ranking Police Officers and Sick Leave Incentive Pay for Firefighters

Regarding accumulated leave time for ranking police officers, i.e., "prep time," and sick leave incentive pay for firefighters, this Court's previous panel instructed the trial court that both plans are compensatory and should be included in plaintiffs' pension calculations to the extent factual support exists for plaintiffs' arguments that "the programs are designed to discourage employees from taking time off and to compensate for required attendance at activities outside their regular shift or added responsibilities due to the nature of their rank" and that "both programs . . . give employees the option of collecting either additional leave time or, in effect, a cash bonus for doing 'normal work.'" Thus, if plaintiffs showed on remand that factual support exists for their arguments, the trial court was constrained by this Court's previous opinion to include prep time and sick leave incentive pay in calculating plaintiffs' pensions. *Kalamazoo*, n 3 *supra*.

A. Prep Time for Ranking Police Officers

On remand, it was undisputed that prep time was instituted to compensate ranking police officers for having to arrive to work early to prepare for their assigned shifts and for having to work after their shift was officially over.⁷ The trial court concluded that "the money paid to employees as a result of non-use of prep time amounts to an irregular payment that is in essence a bonus paid for an unusual situation" and should not be included in "base rate of pay."

⁷ Evidence was presented that a ranking police officer is required to arrive twenty to thirty minutes before his shift to review the police logs, make out time sheets, call in extra staff to work overtime in case of a staff shortage, etc.

The trial court reached its conclusion in large part because of the fact that ranking police officers had the option of taking days off, cashing in unused days in the year they accumulated, or deferring payment until retirement. This Court, however, in its prior opinion considered the fact that the ranking police officers have an option of receiving leave time or payment for prep time. In the prior opinion, the Court determined that plaintiffs were entitled to have prep time included in their pension calculations if there were factual support for their argument that the “program gives employees the *option* of collecting either additional leave time or, in effect, a cash bonus for doing ‘normal work’” (emphasis added). This Court’s prior opinion created the law of the case on this issue, which was binding on the trial court. *Kalamazoo*, n 3 *supra*. The trial court erred to the extent it disregarded this Court’s conclusion. Plaintiffs provided the requisite factual support on remand for their argument. Plaintiffs also supported their argument that prep time is paid to ranking police officers for “required attendance at activities outside their regular shift or added responsibilities due to the nature of their rank.”

Evidence was also presented below, which the trial court acknowledged, that the current form of prep time, i.e., eighty hours of accumulated time off for which payment can be requested, was instituted to avoid paying the retirees their share of the prep time payments, of which the retirees received one-half in pension payments. In *Banish*, this Court noted that “[w]e look beyond form to substance” and the City cannot simply adopt “correct nomenclature” and divide the pay of active employees into categories “plausibly packaged and labeled” with the deliberate purpose “of depriving retirees of the full pension rights which the charter mandates.” *Banish*, *supra* at 389. The City’s apparent attempt to avoid paying the retirees their share of prep time by changing the form in which prep time is compensated militates toward including this item in the pension calculations. *Id.*

Defendants’ argument is without merit that prep time payments should be excluded because the amount of actual prep time paid to ranking officers varies from year to year which would result in fluctuations in the yearly amount used to calculate the pension. This Court rejected a similar argument in *Banish*, *supra* at 389, and noted, that “[t]he charter provision requiring escalation or reduction of retirement pay expresses a purpose that retirement benefits will, in fact, escalate and reduce as the pay of the rank in which the retiree was serving at the time of retirement changes.”

Consequently, the trial court clearly erred in excluding prep time payments from plaintiffs’ pension calculations.⁸

B. Sick Leave Incentive Pay for Firefighters

The trial court correctly noted, that employees received pay for unused sick time under an incentive program where an employee could cash out a portion of his or her sick time bank if he did not

⁸ Only payments to active ranking police officers for unused time off which are made in the same [fiscal] year for which the prep time is given should be included in plaintiffs’ pension calculations. This Court has declined to include payments which are deferred until retirement, considering such deferred payments to be a “retirement bonus” and not a part of regular compensation. See *Gentile*, *supra* at 619-620, and cases cited therein.

take a designated number of days off sick. Similar to its considerations for prep time, the court did not include sick leave incentive pay in plaintiffs' pension calculations because the court concluded that it constituted "an irregular payment in the nature of a bonus."

This Court in its previous opinion also determined that, as with prep time, to the extent plaintiffs' arguments before this Court were factually supported on remand, the sick leave plan *is* compensatory and should be included in plaintiffs' pension calculations. Thus, plaintiffs were entitled to prevail if they could show on remand that the sick leave incentive plan was "designed to discourage employees from taking time off" and that it gave "employees the option of collecting either additional leave time or, in effect, a cash bonus for doing normal work." The evidence in fact showed, and the trial court and defendants both recognized, that this program was designed to discourage employees from taking time off. The evidence also showed that the firefighters had the option to use their sick time for actual sick days, to accumulate sick leave time in their sick bank, or to in effect get paid a bonus for days not used and for which they did normal work. Plaintiffs' arguments regarding their sick leave incentive program were factually supported below. Therefore, pursuant to this Court's prior decision in this case and giving due accord to the doctrine of law of the case, we hold that sick leave incentive payments are to be included in plaintiffs' pension calculations.⁹ *Kalamazoo*, n 3 *supra*.

Food, Gun and Clothing Allowances

Citing *Gentile*, *supra* at 618, and *Banish*, *supra* at 391, this Court in its previous opinion noted that gun, clothing and food allowances are not part of an employee's pay when they are reimbursement of actual out-of-pocket expenses, but they should be included to the extent the allowances are designed to increase employees' actual compensation rather than reimbursement of out-of-pocket expenditures.

On remand, the trial court also determined that the food and gun allowances should be included in plaintiffs' pension calculations and that the clothing allowance should be excluded from the pension calculations.

A. Food Allowance (for Firefighters) and Gun Allowance (for Police Officers)

In including both of these allowances in plaintiffs' pension calculations, the trial court noted that plaintiffs' factual assertion was uncontradicted that both gun and food allowances are regularly paid to employees regardless of actual need. The court found that these allowances are not meant to reimburse the employees for actual out-of-pocket expenses, but rather they are meant to increase their actual compensation. We agree and conclude that the evidence supports the trial court's inclusion of the food and gun allowances in plaintiffs' pension calculations.

We note defendants' argument that the members of plaintiffs' class who retired after 1968 should not be eligible for increased pensions based on the food and gun allowances because this group

⁹ As with prep time, only payments made for unused sick time that accrue in the same [fiscal] year should be considered part of employees' "pay" for pension purposes. See n 8 *supra*.

negotiated the allowances in 1968 with the understanding that the retirees would not have

their pensions increased based on the allowances.¹⁰ Defendants' argument is without merit. Plaintiffs, as retirees, are not estopped to now ask that a portion of the allowances be included in their pensions. As in *Gentile*, *supra* at 614, the unions who negotiated for the allowances in this case represented the *active* employees and did not directly represent the interest of retirees. The retirees are not estopped from asking for a portion of the allowances which the union negotiated on behalf of the active employees.

B. Clothing Allowance

Apparently applying *res judicata*, the trial court concluded that the \$500 annual clothing allowance should be excluded from plaintiffs' pension calculations because this Court's decision in *Banish* precluded relitigation of whether the clothing allowance should be included in "base rate of pay." The trial court further determined that, *Banish* aside, the clothing allowance was a form of reimbursement because having uniforms was a job requirement, and the City did not purchase uniforms for its employees, whereas the City did purchase guns for its police officers. We conclude that the facts regarding the clothing allowance have changed since *Banish* was decided, that *Banish* is distinguishable, and that determination of this issue is not barred by *res judicata*.

Res judicata bars a subsequent action between the same parties when the facts of evidence essential to the action are *identical* to those essential to a prior action. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997), *aff'd* 460 Mich 573; 597 NW2d 82 (1999). A second proceeding is not barred if the facts change or new facts develop. *In re Hamlet (After Remand)*, 225 Mich App 505, 519; 571 NW2d 750 (1997); *Labor Council, Michigan Fraternal Order Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994). The applicability of *res judicata* is a question of law which we review *de novo*. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

In *Banish*, in deciding that the City of Hamtramck's clothing allowance for police officers and firefighters was not a part of the "pay" on which the plaintiffs' pensions was calculated, this Court stated that this was a close question that could be decided either way. *Id.* at 391. In reaching its decision, this Court made the following observations:

The amount of the uniform allowance does save the active service employee a corresponding amount and thus, in a sense, increases his pay. However, *there is no evidence* that the uniform allowance was intended or paid as compensation, or *that anyone received the allowance who did not wear a uniform, or that, to state it differently, the allowance was anything more than reimbursement for an actual out-of-pocket expense necessarily incurred in the performance of duty. . . .* If the uniform allowance were larger or if there were evidence that the allowance was paid as

¹⁰ We are unable to find any written documentation to support defendant's argument in the lower court record.

compensation and regarded by the parties as such, we might have taken a different view. [*Id.* at 391-392; emphasis added.]

At the time this Court decided *Banish*, all personnel who were paid a clothing allowance wore a uniform. In contrast, at the time of the instant suit, the record reveals that all employees who received a clothing allowance *did not* wear a uniform. In addition, at the time *Banish* was decided, the City required the firefighters to buy all of their own safety equipment and protective gear as well as their uniforms. After *Banish* was decided, legislation was enacted requiring the City to provide the safety equipment and protective equipment for the firefighters; however, the amount of the clothing allowance paid to the firefighters remained the same. Thus, the facts have changed since *Banish* was decided. Further, the record reflects that at the time of the instant suit the clothing allowance did not reimburse the active employees for their actual out-of-pocket expenses necessarily incurred in the performance of their duties. Under these facts, we hold that the clothing allowance is part of the “pay” active employees received and upon which plaintiffs’ pensions are calculated.

In summary, we hold that the trial court clearly erred in excluding overtime, prep time, sick leave pay, and clothing allowances from the pay or rate of pay on which plaintiffs’ pensions are based. The trial court did not err in including shift differential, food allowances, and gun allowances.

IV.

Defendants argue that laches should bar retroactive relief for plaintiffs because plaintiffs have allegedly sat on their rights for a couple of decades and because the granting of monetary relief to plaintiffs retroactive to six years before the filing of this lawsuit will purportedly have a disastrous financial impact on the City. We disagree.

The trial court rejected similar arguments. We review the trial court’s decision regarding laches for clear error. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). The trial court correctly stated that laches, unlike the statute of limitations, is not primarily concerned with the fact of delay in bringing suit but with the *effect* of delay. *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). To prevail on a defense of laches, a defendant must show not only an inexcusable delay, but also that the defendant was prejudiced by the delay. *Id.*; *Gallagher, supra* at 369-370. We agree with the trial court that defendants did not establish the requisite prejudice. Plaintiffs’ claims are not barred by laches. See *Banish, supra* at 393.

V.

Finally, plaintiffs request that we order that any money judgment in this case be paid from the Hamtramck Police and Fire Pension Fund pursuant to Hamtramck City Charter, Chapter XIII, § 11 and § 15. We decline to do so. This issue is appropriately one to be initially decided by the trial court.

We affirm in part and reverse in part.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey